MOTION FILED

OCT 28 1975

IN THE

Supreme Court of The United States

OCTOBER TERM 1975

No. 75-102

WALTER LEE McELROY and VIRGINIA McELROY,
Petitioners,

v.

RICHARD LOUIS TAYLOR, *Respondent.*

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

FREDRIC R. MERRILL
UNIVERSITY OF OREGON
SCHOOL OF LAW
EUGENE, OREGON 97403
Counsel for Amicus Curiae

IN THE

Supreme Court of The United States

OCTOBER TERM 1975

No. 75-102

WALTER LEE McELROY and VIRGINIA McELROY,
Petitioners,

v.

RICHARD LOUIS TAYLOR, *Respondent.*

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Holt Adoption Program, Inc., hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of an attorney for respondent has not been obtained because respondent's attorney in the proceedings in state court resigned after the filing of the petition for certiorari and, although the court has directed respondent to reply to the petition, no appearance by counsel on behalf of respondent has been filed with the court.

The interest of Holt Adoption Program, Inc., arises from that fact that it arranged the adoption of the Korean child by petitioners, is successor to the guardian appointed for the child in Korea and consented to the adoption of the child by petitioners in Tennessee. The action of the Tennessee Court of Appeals, holding the Korean proceedings void, directly involved petitioners' interests. Holt Adoption Program, Inc., is also interested in this case because it has arranged for the adoption of over fifteen thousand Korean children in the United States and in Europe and has relied upon similar Korean proceedings to perfect these adoptions. If the Korean proceedings terminating parental rights and vesting right to consent to adoption in a guardian can be held void in local courts on the grounds of local public policy, the status of other children whose adoption proceedings involved reliance upon the Korean procedures and consent of a Korean guardian is in question.

It is believed that the Act of State question involved in this case is of extreme importance and was not adequately dealt with by the state courts. The brief of amicus curiae contains a more complete exposition and argument on the Act of State doctrine as it relates to this case than could be presented by the petition for certiorari.

Respectfully submitted,

Fredric R. Merrill
University of Oregon
School of Law

Counsel for Amicus Curiae

Supreme Court, U. S.
FILED
OCT 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM 1975

No. 75-102

WALTER LEE McELROY and VIRGINIA McELROY,
Petitioners,

v.

RICHARD LOUIS TAYLOR, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI BY HOLT ADOPTION PROGRAM, INC. AS AMICUS CURIAE

FREDRIC R. MERRILL
UNIVERSITY OF OREGON
SCHOOL OF LAW
EUGENE, OREGON 97403
Counsel for Amicus Curiae

INDEX

Statement of the Case 1

Interest of Holt Adoption Program, Inc. 2

Argument

I. THE APPLICATION OF THE ACT OF STATE DOCTRINE DOES NOT DEPEND UPON WHICH OFFICIAL OF THE FOREIGN GOVERNMENT ACTS ON BEHALF OF THE STATE. 6

II. THE ISSUE PRESENTED BY THIS CASE IS WHETHER THE ACTS OF THE GOVERNMENT OF THE REPUBLIC OF KOREA, WHICH TERMINATED RESPONDENT'S PARENTAL RIGHTS AND VESTED THOSE RIGHTS IN A GUARDIAN, ARE THE TYPE OF ACTS WHICH ARE COVERED BY THE ACT OF STATE DOCTRINE. 8

A. THE APPLICATION OF THE ACT OF STATE DOCTRINE IS NOT LIMITED TO EXPROPRIATION OF PROPERTY BY FOREIGN GOVERNMENTS. 9

B. THE GENERALLY ACCEPTED DEFINITION OF AN ACT OF STATE IS AN ACT BY A FOREIGN STATE WHICH GIVES EFFECT TO THAT STATE'S PUBLIC INTERESTS. 11

C. IF JUDICIAL REVIEW OF AN ACT OF A FOREIGN STATE BY LOCAL COURTS WOULD BE JUSTIFIABLY OFFENSIVE TO THE ACTING STATE THIS WOULD JEOPARDIZE THE CONDUCT OF THE FOREIGN AFFAIRS OF THE UNITED STATES AND THE ACT INVOLVED IS AN ACT OF STATE. 13

D. UNDER THE CIRCUMSTANCES OF THIS CASE, HOLDING THE ACTS OF REPUBLIC OF KOREA VOID BECAUSE OF LOCAL PUBLIC POLICY WOULD BE OFFENSIVE TO THE REPUBLIC OF KOREA AND WOULD AFFECT THE CONDUCT OF FOREIGN RELATIONS BY THE UNITED STATES. 17

INDEX TO AUTHORITIES

CASES

Page

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) 10

Baker v. Carr, 369 U.S. 186 (1962) 16

Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398 (1964) 9, 13, 14, 15, 16

Bernstein v. Van Heyghen Freres Societe Anonyme, 163 Fed. 2d 246 (2nd Cir. 1947), cert. den. 332 U.S. 772 8

Carl Ziess, Stiftung v. V.E.B. Carl Ziess, Jena, 293 F. Supp. 892 (S.D. NY 1968), affirmed 433 F. 2d 686 (2nd Cir. 1970), cert. den. 403 U.S. 905 10

First National City Bank v. Banco Nacional De Cuba, 406 U.S. 759 (1972) 9

Frazier v. Foreign Bondholders, 283 App. Div. 44, 125 N.Y. 2d 900 (1953) 10

French v. Banco Nacional De Cuba, 23 NY 2d 46, 295 N.Y.S. 2d 433, 242 NE 2d 704 (1968) 10

Hewitt v. Speyer, 250 F. 367 (2nd Cir. 1918) 10

Holzer v. Deutsche Reichsbahn Gesellschaft, 277 NY 474, 14 NE 2d 798 (1938) 8, 11

In Re Adoption By McElroy, 522 SW 2d 345 (1975) ... 6

Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D.C. Del. 1970) 10

Jimenez v. Aristeguieta, 311 F. 2d 547 (5th Cir. 1962), cert. den. 373 U.S. 914, reh. den. 374 U.S. 858 7

New York Times Co. v. City of New York, 362 N.Y.S. 2d 321, 79 Misc. 2d 1046 (1974) 11

Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C. D. Cal. 1971); Affirmed 461 F. 2d 1261 (9th Cir. 1972) cert. den. 409 U.S. 950 10

Steingut v. Guaranty Trust Co. of New York, 58 F. Supp. 623 (S.D. N.Y. 1944) 10

South African Airways v. New York State Division of Human Rights, 315 N.Y.S. 2d 651 (1970) 11

Underhill v. Hernandez, 168 U.S. 250 (1897) 10

Union Shipping & Trading Co. vs. United States, 127 F. 2d 771 (2nd Cir. 1942) 10

U.S. ex rel., Stienvorth v. Watkins, 159 F 2nd 50 (2nd Cir. 1947) 10

U.S. ex rel., Von Heymann v. Watkins, 159 F. 2nd 650 (2nd Cir. 1947) 10

Wells Fargo and Co., Express S.A. v. Tribolet, 46 Ariz. 311, 50 P2d 878 (1935) 11

Vanity Fair Mills v. T. Eaton Co., 234 F 2nd 633 (2nd Cir. 1956) cert. den. 352 U.S. 871 10

MISCELLANEOUS

Adams and Kim, A Fresh Look at Intercountry Adoptions, 18 *Children* 214 (1971) 19

Annotation, Modern Status of the Act of State Doctrine, 12 ALR Fed. 707 (1972) 7

Chae, *Handbook of Korea*, (1958) 8

Cornell Law School, *International Law in National Courts, Proceedings of the 3rd Summer Conference on International Law*, (1960) 9, 11, 16

Falk, *The Aftermath of Sabbatino*, (1965) 11

Goldie, The *Sabbatino Case:* International Law v. The Act of State, 12 *UCLA L. Rev.* 107 (1964) 8, 9, 11

Lillich, *The protection of Foreign Investment; Six Procedural Studies*, (1965) .....

Norton, Reflections on the Act of State Doctrine; A Fifth Wheel in the Conflict of Laws, 10 *Houston Law Review* 1 (1972) 16

Note, Mitigating the Rigors of the Act of State Doctrine: The General Principle of Law Recognized By Civilized Nations, 20 *Syracuse L. Rev.* 705 (1969) .. 10, 16

Note, The Act of State Doctrine - Its Relation to Private and Public International Law, 62 *Col. L. Rev.*, 1278 (1962) 13, 16

Reeves, *The Sabbatino Case*, 32 *Fordham L. Rev.* 631 (1964) 8, 13

Restatement of Foreign Relations Law, §41 (1965) 7, 12, 13, 17

Restatement of Foreign Relations Law, Proposed Official Draft, §41 (1962) 12

Restatement of Foreign Relations Law, Tentative Draft No. 4, §28a (1960) 12

U.S. Army, *Area Handbook for Korea* (1964) 8, 18

IN THE

Supreme Court of The United States

OCTOBER TERM 1975

No. 75-102

WALTER LEE McELROY and VIRGINIA McELROY,
Petitioners,

v.

RICHARD LOUIS TAYLOR, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI BY HOLT ADOPTION PROGRAM, INC. AS AMICUS CURIAE

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari to review a decision of the Tennessee Court of Appeals. The Tennessee Court of Appeals refused to apply the Act of State doctrine to acts of the Republic of Korea which terminated Respondent's parental rights in a minor child that Petitioners were seeking to adopt in Tennessee. Korean officials had issued a family registration

as an orphan and appointed a guardian for the child with power to consent to adoption. Petitioners sought to adopt the child in a Tennessee Court with the guardian's consent. Respondent claimed to be the natural father of the child and objected to the adoption. The Tennessee Courts held the acts of the Korean government terminating parental rights and appointing the guardian void on the grounds that inadequate notice had been given to Respondent.

INTEREST OF HOLT ADOPTION PROGRAM, INC.

The Holt Adoption Program, Inc. is a non-profit corporation, incorporated in the State of Oregon. It is engaged in arranging inter-country adoptions of children.

The Holt Adoption Program began in 1956 when Harry and Bertha Holt, from Creswell, Oregon, became concerned about the plight of mixed race children in Korea. They adopted eight children themselves and then began to arrange adoptions of Korean children for other persons in the United States, and ultimately established the Holt Adoption Program, Inc. (Tr. 291).

Holt Adoption Program is licensed by the Korean government as an adoption agency and also operates an orphanage in Korea. It cares for children in Korea which are placed with it by the Korean government. (Tr. 295-296). The Holt Adoption Program receives applications from persons interested in adopting Korean children. It cooperates with child welfare

departments and private agencies in all fifty states to screen and gather information about applicants and match such applicants to Korean children in the custody of Holt Adoption Program and available for adoption. (Tr. 297-299). The children are brought to the United States and adopted through the courts in the state where the adoptive parents live, with the assistance of the cooperating child welfare department or social agency. (Tr. 299).

The interest of the Holt Adoption Program in this case is both direct and indirect. It is directly interested because the child involved was placed through Holt Adoption Program. The Holt Adoption Program was contacted by the petitioners and made all arrangements for the adoption. The guardian appointed for the child was a representative of Holt Adoption Program and subsequently transferred guardianship rights to Holt Adoption Program. Holt Adoption Program brought the child to the United States, assisted the Tennessee Welfare Department in arranging the adoption procedure and consented to the adoption. The action of the Tennessee Court of Appeals in refusing to perfect the adoption and holding Holt Adoption Program's guardianship and capacity to consent to adoption void directly affects Holt Adoption Program's interest in the welfare of the child.

Holt Adoption Program is also indirectly affected by the decision of the Tennessee Court of Appeals. The procedures followed in this case in Korea to secure capacity consent to

adoption are similar to those followed in the adoptions of twelve thousand other Korean children in the United States prior to 1973, and three thousand adoptions of Korean children in other countries. In all these cases, Holt Adoption Program has relied upon the acts of the Korean government to vest guardianship authority and capacity consent to adoption in it, and the adoptions have been perfected by the consent of Holt Adoption Program. The possibility that state courts could invalidate these adoptions by refusing to recognize the Korean guardianship proceedings as contrary to the public policy of the forum is a matter of extreme concern to Holt Adoption Program. It has been, and remains, vitally interested in the security and welfare of these children. The decision of the Tennessee Court of Appeals jeopardizes the security and welfare of these children by jeopardizing the validity of their adoptions in the United States.

SUMMARY OF ARGUMENT

The Act of State doctrine is a special choice of law rule that prevents American courts from reviewing the validity of acts of foreign states. The Tennessee Court of Appeals in this case held that the Korean family registration as an orphan and appointment of a guardian, which terminated Respondent's parental rights and vested the right to consent to adoption in the guardian, void based upon local public policy.

The Tennessee Court of Appeals refused to apply the Act

of State doctrine because the acts had been done by local Korean government officials as opposed to national Korean government officials. The question presented under the Act of State doctrine, however, is not the identity of the actors, but the nature of the act and the relationship to the interests of the state. The argument of amicus addresses itself primarily to the issue of whether the acts covered by the Act of State doctrine.

Not all acts of a foreign government are immune from review in American courts under the Act of State doctrine. If the acts are not of the type covered by the Act of State doctrine, they are subject to the ordinary choice of law rules that would allow the Tennessee Court to refuse to recognize the acts on the grounds of local public policy.

Whether the acts of a foreign state fall within the Act of State doctrine depends upon whether the acts involved should be protected from review by American courts according to the rationale underlying the Act of State doctrine. The purpose of the Act of State doctrine is proper distribution of authority between the judicial and executive branches of our government in the conduct of foreign affairs. The refusal to review an act of a foreign government is necessary where the act is of such a nature that a review by local courts would be justifiably offensive to the acting government and create a foreign relations problem in the United States. This requires the court to examine the act in context and determine the relationship of the act to the national interests of the acting state.

In this case the termination of parental rights and appointment of a guardian was not a settlement of a private dispute, but a procedure adopted by the Korean government to facilitate the foreign adoption of mixed race children born in Korea. Mixed race children are excluded from Korean society and securing care and families for such children is a Korean national problem. The refusal to accept the validity of the acts undertaken by the Korean government, to solve this problem through foreign adoption, frustrates the national goals of the Korean government and would be offensive to them and thus presents a foreign relations problem for the United States.

ARGUMENT

I. THE APPLICATION OF THE ACT OF STATE DOCTRINE DOES NOT DEPEND UPON WHICH OFFICIAL OF THE FOREIGN GOVERNMENT ACTS ON BEHALF OF THE STATE.

The basis for rejection of application of the Act of State doctrine to this case by the Tennessee Court of Appeals was the nature of the actors. The Tennessee Court distinguished an action of a sovereign nation from an action of a subdivision of the government of that nation and held that the Act of State doctrine did not apply to "administrative action by the officers of the City of Seoul, Korea... *In Re Adoption By McElroy*, 522 SW 2d 345, 349 (1975).

This basis for avoidance of the application of the Act of State doctrine is palpably incorrect and avoids the real issue

presented by this case.

No other American court has made this distinction a basis for rejection of the Act of State doctrine. The only authority cited by the Tenessee Court of Appeals is an ALR Fed. Annotation which does not support its position.[1]

The decision denying application of the Act of State doctrine based upon the exact position of the actors in the governmental hierarchy of Korea is illogical. It has no relationship to the ultimate question of whether the acts involved are of a nature to which protection should be given under the Act of State doctrine to achieve the purposes of that doctrine.[2] Clearly, if the acts involved were not done with some authority or sanction of the foreign state, the Act of State doctrine would not apply.[3] On the other hand if the acts are within the laws of the state and done to effectuate state policy, the person selected by the state to actually do the acts is immaterial.[4] In some cases states can call upon private

---

(1) Actually the citation at 522 SW 2d 349 is to 12 ALR Fed. 339, which is an Annotation relating to immunity from private liability under the anti-trust laws. The Tennessee Court must have intented to cite the Annotation at 12 ALR 2d 707 "Modern Status of the Act of State Doctrine." Section 5 of that Annotation, at page 739, deals with the meaning of "state" but the cases cited and the discussion relate only to the status of a political entity in the international community and not who can act on behalf of the State under the Act of State doctrine. There is no question in this case that the Republic of Korea is a state within the meaning of that concept under the Act of State doctrine.

(2) *Restatement of Foreign Relations Law*, Sec. 41, comment d, p. 127 (1965).

(3) *Jimenez v. Aristeguieta*, 311 F. 2d 547 (5th Cir. 1962), cert. den. 373 U.S. 914, reh. den. 374 U.S. 858.

(4) Reeves, *The Sabbatino Case*, 32 *Fordham L. Rev.* 631, 647-648 (1964).

individuals to act on behalf of the state and these can and have been defined as acts of state.[5] In the present case it is not necessary to decide whether private persons could perform an act of state because the District Chief and Mayor of Seoul, Korea who performed the acts involved were clearly public officials whose authority to engage in the acts was given by Korean law, and who acted in a governmental capacity.

The implied assumption in the Tennessee Court of Appeal's opinion that the officials involved were not somehow not agents of the national Korean Government is invalid, both because their acts were authorized by national law (see Exhibit 18, page 3-5) and because of the centralized administrative structure in Korea under which at least the Mayor of the Special City of Seoul, Korea is a national official under the direction of the ministry of home affairs.[6]

II. THE ISSUE PRESENTED BY THIS CASE IS WHETHER THE ACTS OF THE GOVERNMENT OF THE REPUBLIC OF KOREA WHICH TERMINATED RESPONDENT'S PARENTAL RIGHTS AND VESTED THOSE RIGHTS IN A GUARDIAN ARE THE TYPE OF ACTS WHICH ARE COVERED BY THE "ACT OF STATE" DOCTRINE.

(5) For example, *Holzer v. Deutsche Reichsbahn Gesellschaft*, 277 NY 474, 14 NE 2d 798 (1938); see discussion in *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 Fed. 2d 246, 248 (2nd Cir. 1947) cert. den. 332 U.S. 772; see also Goldie, *The Sabbatino Case:* International Law versus the Act of State, 12 *UCLA L. Rev.* 107, 125, Fn 79 (1964).

(6) See U.S. Army, *Area Handbook for Korea*, 215-217 (1964); Chae, *Handbook of Korea*, 128-136 (1958).

A. THE APPLICATION OF THE ACT OF STATE DOCTRINE IS NOT LIMITED TO EXPROPRIATION OF PROPERTY BY FOREIGN GOVERNMENTS.

The real question presented by this case is whether the family registration as an orphan and the appointment of a guardian which cut off Respondent's parental rights and vested these rights in a guardian are acts which fall within the Act of State doctrine. Clearly these were actions of the Korean government, but were they "acts of state" within the meaning of that term in the courts of the United States, and thus immune from review by United States court?

Some actions of foreign states have been historically treated as "acts of state" whereas other actions have been treated under other choice of law rules.[7] Ordinary choice of law rules are frequently applied to foreign judicial decisions and the validity of such decisions is subject to review in American courts and may be held void on the grounds of the public policy of the forum.[8]

The recent development of the Act of State doctrine in the United States has been in the context of foreign expropriations of property.[9] The application of the Act of State

(7) Goldie, *supra*, note 5, 114.

(8) Cornell Law School, *International Law in National Courts, Proceedings of the 3rd Summer Conference on International Law*, 64 (1960).

(9) *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398 (1964); *First National City Bank v. Banco Nacional De Cuba*, 406 U.S. 759 (1972).

doctrine in these expropriation cases has been exhaustively examined by the courts and text writers, but the legal literature contains almost no discussion of what other types of state acts qualify for treatment under the Act of State doctrine. (10)

It is clear that the Act of State doctrine is not limited to expropriation cases. Cases applying the Act of State doctrine have frequently involved other types of state action, but none of the courts involved has directly addressed the issue of what kind of state acts qualify for the special treatment of the Act of State doctrine. (11)

---

(10) Lillich, *The Protection of Foreign Investment; Six Procedural Studies*, 45 Fn. 1 (1965); Note, Mitigating the Rigors of the Act of State Doctrine: The General Principles of Law Recognized by Civilized Nations; 20 *Syracuse L. Rev.* 705, 715 (1969).

(11) The first United States Supreme Court case explicitly dealing with the Act of State doctrine did not involve an expropriation of property. In *Underhill v. Hernandez*, 168 U.S. 250 (1897), the acts involved were assault and false imprisonment. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) involved harrassment and obstruction of the construction of a railroad as well as expropriation of property. Other cases involving the act of state doctrine where the acts involved were not solely expropriation of property are: *Carl Ziess, Stiftung v. V.E.B. Carl Ziess, Jena*, 293 F. Supp. 892 (S.D. N.Y. 1968), affirmed 433 F 2d 686 (2nd Cir. 1970), cert. den. 403 U.S. 905; *Hewitt v. Speyer*, 250 F. 367 (2nd Cir. 1918); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D.C. Del. 1970); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971); Affirmed 461 F. 2d 1261 (9th Cir. 1972) cert. den. 409 U.S. 950; *Steingut v. Guaranty Trust Co. of New York*, 58 F. Supp. 623 (S.D. N.Y. 1944); *Union Shipping & Trading Co. v. United States*, 127 F. 2d 771 (2nd Cir. 1942); *Vanity Fair Mills v. T. Eaton, Co.* 234 F. 2nd 633 (2nd Cir. 1956) cert. den. 352 U.S. 871; *U.S. ex rel., Von Heymann v. Watkins*, 159 F. 2nd 650 (2nd Cir. 1947); *U.S. ex rel., Stienvorth v. Watkins*, 159 F 2nd 50 (2nd Cir. 1947); *Frazier v. Foreign Bondholders*, 283 App. Div. 44, 125 N.Y. 2d 900 (1953); *French v. Banco Nacional De Cuba*, 23 NY 2d 46, 295 N.Y.S. 2d 433, 242 NE 2d 704 (1968); *Holzer v. Deutsche Reichsbahn Gesellschaft*, 277

The decision by the Tennessee Court of Appeals not to recognize the termination of parental rights and appointment of guardian by Korea was based upon the public policy of the State of Tennessee. If these acts were "acts of state" this clearly was improper. The question then of the type of acts which fall within the Act of State doctrine is directly presented by this case.

B. THE GENERALLY ACCEPTED DEFINITION OF AN ACT OF STATE IS AN ACT BY A FOREIGN STATE WHICH GIVES EFFECT TO THAT STATE'S PUBLIC INTERESTS.

The development of a workable test for distinguishing acts of state from other acts of a foreign government is difficult. (12) The American Law Institute in its *Restatement of Foreign Relations Law* encountered considerable difficulty in formulating a definition of acts of state. The tentative draft of the section dealing with acts of state said:

> ". . . the term 'act of state' means an act by which a state prescribes or enforces rules attaching legal conse-

---

NY 474, 14 NE 2d 798 (1938); *New York Times Company v. City of New York*, 362 N.Y. S. 2d 321, 79 Misc. 2d 1046 (1974); *South African Airways v. New York State Division of Human Rights*, 315 N.Y. S. 2d 651 (1970); *Wells Fargo and Co., Express S.A. v. Tribolet*, 46 Ariz. 311, 50 P2d 878 (1935.

(12) For example, Falk, *The Aftermath of Sabbatino*, 57 (1965), raises the question of the application of Act of State doctrine to acts other than expropriation but never deals with the issue; *Goldie, supra*, Note 5, 114-117, spends four pages pointing out the vagueness of the definition of the acts covered by the Act of State doctrine and criticizing the approach used by the *Restatement of Foreign Relations Law*, but does not provide a workable test of acts of state. See also Cornell Law School *supra*, Note 8, 61-70.

quences to conduct, including rules relating to property status and other legal interests, determining or giving effect to the interest of the acting state as a state as distinguished from action by that state determining or giving effect to interests of a private nature." *Restatement of Foreign Relations Law, Tentative Draft No. 4,* Sec. 28 a, P. 2 (1960).

The proposed official draft, in 1962, used the following approach:

". . . (c) The foreign state has prescribed and enforced a law determining or giving effect to the public interest of that foreign state." Sec. 41, P. 128.

"Judgments of courts may be, but usually are not, acts of state, either because they involve the interests of private litigants, including the state itself as a party claiming interests of an essentially private or proprietary nature, or because the public interest of the state that private disputes be settled is not thought of as a matter of high state policy." Comment C. p. 130.

The version of the *Restatement of Foreign Relations Law* that was finally adopted defines an act of state as:

". . . an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests." Sec. 41, p. 125.

"Nature of act of state. An 'act of state' as the term is used in this Title involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory. In determining whether an act is an act of state, the branch or agency of the government — executive, judicial, or legislative — that performed the act is not as important as is the nature of the action taken. A judgment of a court may be an act of state.

Usually it is not, because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to to give effect to its public interests." Comment d, P. 127. 13

C. IF JUDICIAL REVIEW OF AN ACT OF A FOREIGN STATE BY LOCAL COURTS WOULD BE JUSTIFIABLY OFFENSIVE TO THE ACTING STATE THIS WOULD JEOPARDIZE THE CONDUCT OF THE FOREIGN AFFAIRS OF THE UNITED STATES AND THE ACT INVOLVED IS AN ACT OF STATE.

The restatement approach does focus upon the relationship between the act and the interests or goals of the foreign state. The definition, however, does not provide a basis for determining when acts involve the "public interests" of a state in such a way that the acts should be immune from review by foreign courts.

The problem is that almost any act of a state involves its public interest to some extent. A state would have some public interest in having the decisions of its courts upheld in foreign countries. The question is when is the public interest of a state sufficient that the acts should be immune from review in foreign courts? This question can only be answered by looking at the purpose underlying the application of the Act of State doctrine in United States Courts.

In *Banco Nacional De Cuba v. Sabbatino,* 376 U.S. 398

---

(13) Reeves, *supra,* Note 4, 639 (1964); Note, The Act of State Doctrine - Its Relation to Private and Public International Law, 62 *Col. L. Rev.,* 1278, 1288 (1962).

(1964) the court identified the purpose of the Act of State doctrine as distribution of functions between the legislative and judicial branches of government relating to the conduct of foreign affairs.14 The court then identified four specific considerations for determining the proper distribution of functions in dealing with expropriations of property by foreign states:

(1) The extent of consensus or codification on the subject in international law;
(2) The importance of the implications of an issue for our foreign relations;
(3) Whether the government which acted still exists; and
(4) The presence or absence of a treaty or other unambiguous agreement regarding the controlling legal principles. 15

The functional analysis used by the court in the *Sabbatino* case provides a method of examining any act of a state to determine if it falls within the Act of State doctrine. The *Sabbatino* case dealt with the act of expropriation of property but the general purpose of the Act of State doctrine is a ". . . proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." 16 The more specific questions considered in the *Sabbatino* case to determine the proper distribution of

(14) 376 US at 427-428.
(15) 376 US at 428.
(16) 376 US at 427-428.

functions all bear upon the probability of a legitimate adverse reaction by the acting state if our courts attempt to review the validity of the act:

(1) Presumably a judicial decision applying a clearly established rule of international law would be less offensive than applying local policy or a questionable international law rule;
(2) The question of the existence of important implications for foreign relations is clarified by the Court's statement that ". . . some aspects of international law touch more sharply on national nerves than do others;" 17 This suggests that the likelihood of a state being disturbed by review of its acts in the courts of another country is the factor that would raise important implications for our foreign relations;
(3) Presumably if the act was that of a government no longer in existence, the likelihood of offense by that government is gone and embarrassment of foreign is diminished; and
(4) The existence of a treaty or other unambiguous agreement regarding the controlling legal principles would provide a basis for judicial review of the act in the courts of another state which should not be offensive to the acting state.

(17) 376 US at 428.

The specific factors used by the *Sabbatino* court to determine if the Act of State doctrine should be applied are all considerations in determining whether under the circumstances a review of the particular act would be offensive to the foreign state and create a foreign relations problem for the United States. 18 The questions presented are how important is immunity from review to the existing government of the acting state and to what extent under existing custom, international law and treaties does the acting state have a legitimate expecta-

(18) See Cornell Law School, *supra*, Note 8, 94; Note, Mitigating the Rigors of the Act of State Doctrine: The General Principle of Law Recognized By Civilized Nations, 20 *Syracuse L. Rev.* 705, 718 (1969).

For general discussion of this analysis, see Falk, *supra*, Note 12, 18-20. The analysis bears some similarity to that used to determine when a political question arises. The Court in *Baker v. Carr*, 369 US 186 (1962), discussed the political question cases involving foreign relations such as existence of a treaty, recognition of foreign government, sovereignty over territory, etc. The Court said:

> "Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." 369 US 211-212.

See Note, The Act of State Doctrine - Its Relation to Private and Public International Law, 62 *Col. L. Rev.*, 1278, 1283-1286 (1962).

This similarity has led at least one commentator to assert that the Act of State cases should be treated simply as another form of political question. Norton, Reflections on The Act of State Doctrine; A Fifth Wheel in the Conflict of Laws, 10 *Houston Law Review* 1 (1972). This approach, however, is clearly not appropriate. The questions raised are similar but not identical. *Baker v. Carr* had been decided before the *Sabbatino* case, and was not used as the basis for analysis of the Act of State doctrine by the Supreme Court. The federal question doctrine is based on constitutionally required separation of powers whereas the Sabbatino court very carefully pointed out that the Act of State doctrine is not constitutionally compelled, see 376 US 423.

tion that such acts will be immune from review.

This is recognized in the comments following Sec. 41 of the *Restatement of Foreign Relations:*

> "However, when a court applies the act of state doctrine, it does so under circumstances that require it to weigh the effect, on the relations between the state in which it sits and the foreign state, of its possible disregard of the public interests of the foreign state that are reflected in the act in question. It is this factor that differentiates act of state cases from routine cases involving conflict of laws decisions. When an agency of another state has taken action affecting legal relationships of persons or things within its territory and has done so in a manner which makes it clear that it is giving effect to the public interests of the state, the act of state doctrine precludes a court in the United States, except as provided by statute, from examining such action. The policy underlying the doctrine is that the courts should abstain from any action that might hinder the executive branch of the government in the conduct of foreign relations." Comment C, p. 127.

D. UNDER THE CIRCUMSTANCES OF THIS CASE, HOLDING THE ACTS OF REPUBLIC OF KOREA VOID BECAUSE OF LOCAL PUBLIC POLICY WOULD BE OFFENSIVE TO THE REPUBLIC OF KOREA AND WOULD AFFECT THE CONDUCT OF FOREIGN RELATIONS BY THE UNITED STATES.

The acts involved in this case are termination of parental rights in a Korean minor child and transfer of those rights to a guardian. If these acts had been a judicial decision to resolve a private dispute as to custody or parental rights, the case would be no different from any other foreign judgment and the Act

of State doctrine would not apply. The Act of State doctrine, however, does apply in this case because the acts were not a judicial settlement of a private dispute, but administrative action by Korean officials to solve a national problem in Korea.

To put the acts involved in context, some understanding of Korean society is necessary. The primary element of social organization in Korean society is the extended family and the establishment of a family relationship through the Korean family registration system is vital to participation in Korean society. (19) The testimony presented in this case shows that lack of identification with a family unit through formal family registration results in inability to participate in Korean society.(20)

The second aspect of Korean society that is important to this case is the problem of the treatment of mixed race children in Korea. The problem is presented by children who are born of relationships between Korean women and the large numbers of American servicemen who have been in Korea since 1958.(21) Being of non-Korean paternal parentage, the children cannot be affiliated with any established family through registration by the father. The Korean government attempted to deal with

(19) U.S. Army, *supra*, Note 6, 77-90 (1964).

(20) Tr. 309-311.

(21) Tr. 292-293, 346.

this by providing for family registration through the mother, but family and societal pressures against acknowledging the birth of these mixed race children caused the mothers not to register the children as members of their family and to the frequent abandonment of the children.22 The Korean government is thus faced with the problem of a substantial number of children23 who are not receiving care and family attention and who have no future prospects of being assimilated by Korean society. One potential solution to this problem is foreign adoption of these children.24 The registration of these mixed race children as a new family and the appointment of a guardian with power to consent to the adoption in a foreign country of these children are means to effectuate a policy of encouraging foreign adoption of mixed race children.

Under these circumstances the termination of Respondent's parental rights and vesting of these rights in a guardian appointed by the Korean government was an act of state. The Korean government has a direct state interest in the validity of these acts as a means of solving the national problem of mixed race children. Korea has not agreed by to a review of these

(22) Tr. 307-308, 310-311.

(23) Some indications or the dimensions or the problem is given by the fact that Holt Adoption Program, as one of many adoption agencies, placed over 15,000 Korean children for adoption between 1956 and 1973. Tr. 293-294.

(24) Adams and Kim, A Fresh Look at Intercountry Adoptions, 18 *CHILDREN* 214, 218 (1971).

acts in American courts and no settled principle of international law subjects these acts to review in foreign courts. Allowing American state courts to invalidate these acts will frustrate a Korean national objective and could offend the Korean government and thus impair our conduct of foreign relations.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue and the Judgment of the Tennessee Court of Appeals should be reversed.

Respectfully Submitted,

FREDRIC R. MERRILL
University of Oregon
School of Law
Eugene, Oregon 97403
Counsel for Amicus Curiae